

Furlough Fact Sheet

A furlough is the placing of an employee in a temporary nonduty, nonpay status because of lack of work or funds, or other nondisciplinary reasons. There are two types of furloughs – a “shutdown” or “emergency” furlough and a “save money” furlough.

- “Shutdown” or “Emergency” furlough happens when an agency no longer has the necessary funds to operate and must shut down those activities which are not excepted by Office of Management and Budget (OMB) standards.
- “Save Money” furlough is a planned event by an agency which is designed to absorb reductions necessitated by downsizing, reduced funding, lack of work, or any other event which requires the agency to save money.

“Shutdown” or “Emergency” furlough

A shutdown furlough results when Congress fails to enact either regular appropriations, a continuing resolution, or needed supplementals resulting in interruption of fund availability. Where actions are taken because of a sudden emergency requiring curtailment of government services, no advance notification is at time not possible. Consequently, the customary 30-day advance notice period and opportunity to answer are waived under 5 C.F.R. 752.404(d)(2) and under 5 C.F.R. 359.806(a) for senior executive career appointees.

Preparing for Furlough:

As Congress continues to debate over budgets for the current and upcoming fiscal years, it is recommended that agencies have a process in place for conducting a furlough. OPM recommends agencies take the following steps:

- Communicate with employees and their representatives regarding agency plans if it becomes necessary to effect an orderly suspension of agency operations.
- Prepare draft “emergency” furlough decision notices and plans for distribution to employees to the extent possible with the limited time available.
- Determine which positions are excepted under the guidelines established by the Office of Management and Budget (OMB).
- Notify employees of the furlough decision in writing which can be electronic or in person. Employees can sign for receipt of notification in person or via email.

Procedural Rights:

For furloughs of 30 calendar days or less, by law (5 U.S.C. 7513) covered employees are provided the following rights:

- At least 30 calendar days advance written notice by the agency stating the specific reasons for the proposed action. (Copies of sample notice attached.)
- At least 7 calendar days for the employee to answer orally and in writing to the proposal notice and to furnish documentary evidence in support of his or her answer.
- The right of the employee to be represented by an attorney or other representative.
- A written decision by the agency with the specific reasons for its action at the earliest time practicable.
- The right to appeal the agency’s action to the Merit System Protection Board.

Identification of Employees Excepted from Furlough:

The term “excepted employee” refers to employees who are excepted from furlough by law because they are (1) performing emergency work involving the safety of human life or the protection of property, (2) involved in the orderly suspension of agency operations, or (3) performing other functions exempted from the furlough. Copies of OMB issuances which provide guidance on application of these criteria are attached.

OPM’s regulations at 5 CFR 752.404(b)(2) provide if an agency is furloughing some, but not all employees in a competitive level, the notice of proposal must state the basis for selecting the particular employee as well as the reasons for furlough. **OAs should take action to ensure the accuracy of established competitive levels in order to meet their obligations under this regulation.** Generally, the term competitive level refers to positions at the same grade level and classification series, the duties of which are interchangeable. Additional procedural rights may be provided by negotiated agreements for bargaining unit employees.

Furlough’s Effects on Benefits and Waiting Periods

In most instances, non-pay time under short-term furlough will not have a negative impact on retirement or health and life insurance. Nonpay status (which includes furlough, leave without pay, absence without leave, and suspension) is credited as follows:

- Career Tenure – the first 30 calendar days of each nonpay period is creditable.
- Probationary Period – 22 workdays in a nonpay status is creditable.
- Qualifications – there is no requirement to extend qualifying periods by the amount of nonpay time.
- Time-in-grade – nonpay status is creditable.
- Retirement – up to 6 months service in a nonpay status per calendar year is creditable.
- Health Benefits – enrollment continues for up to 365 days in a nonpay status.
- Life Insurance – coverage continues for up to 12 consecutive months in a nonpay status.
- Within Grade Increases – 2 workweeks nonpay status in a waiting period is creditable for advancement to steps 2, 3, and 4 of the General Schedule; 4 workweeks for advancement to steps 5, 6, and 7; and 6 workweeks for advancement to steps 8, 9, and 10.
- Leave Accruals – a full-time employee does not earn annual or sick leave during a pay period when he or she reaches 80 hours of nonpay time.

Documenting a Furlough

An SF-50, “Notification of Personnel Action”, must be prepared for each individual subject to furlough. Guidance to determine the appropriate Nature of Action and Legal Authority Code for documenting furloughs and return to duty actions may be found in chapters 15 and 16 of the Guide to Processing Personnel Actions.

References:

5 U.S.C. chapter 75

5 CFR part 752

OPM Website, Guidance and Information on Furloughs <http://www.opm.gov/furlough/furlough.asp>

Sample Notification Letter

Subject: **ACTION**: Notice of Furlough

From:

Human Resources Operations

To: Employee Name

This memorandum is to notify you that [*effective date*], you are being furloughed due to the lapse of legal authority to make expenditures from the [*funding source*]. The programs of the [*Operating Administration (OA)*] no longer have the necessary funds to operate and must curtail those activities that are not essential, or necessary, for the preservation of human life and/or property. A limited number of employees will also be kept working for a limited amount of time solely to assist with the orderly shutdown of agency activities. You will have up to three hours to affect an orderly shutdown of your activities on [*date*], if needed. In the absence of further extension, no further financial obligations may be incurred by [*OA*], except for those related to the orderly suspension of [*OA*] operations.

The furlough is not expected to exceed 30 days and is likely to only last several days. You should listen to public broadcasts and when you hear that a congressional action has been taken to reauthorize this legislation or otherwise allow use of the [*funding source*] to pay employee salaries, you will be expected to return to work on your next regular duty day. Notification will also be sent to you using your email address when this occurs. [*You may also obtain information regarding the status of the furlough by contacting the [OA] Furlough Information Hotline at 202-366-----. The Hotline will be updated regularly to reflect the most current available information concerning the status of the furlough.*] An additional source of information regarding questions and answers may be obtained at: <http://www.opm.gov/furlough/furlough.asp>.

[*This action is being taken because of a sudden emergency requiring curtailment of [funding source] activities; therefore, no advance notification was possible. The customary 30-day advance notice period and opportunity to answer are waived under 5 C.F.R. 752.404(d)(2) and under 5 C.F.R. 359.806(a) for senior executive career appointees.*]

You will be in a nonpay and nonduty status during the furlough. Also, you will not be permitted to serve as an unpaid volunteer, but must remain away from the workplace until you hear or are notified that the reauthorization has been extended or approved. You should not telework or otherwise perform any activities associated with your position during this period. Any paid leave (annual, sick, court, etc.) approved for use during the furlough period is cancelled.

You have the right to appeal this decision to the U.S. Merit Systems Protection Board (MSPB). If you wish to file an MSPB appeal, you must do so in writing or by using the Board's "e-Appeal" electronic internet filing procedure. You must file the appeal within 30 calendar days after the effective date of your furlough. Your appeal should be submitted to the Regional Director, Merit Systems Protection Board, Washington Regional Office, 1800 Diagonal Road, Suite 205, Alexandria, VA 22314-2840. You may obtain additional information concerning the MSPB appeal process, including copies of the regulations and appeal form, and access the "e-Appeal" procedure on the MSPB website at www.mspb.gov.

Please contact _____ (202) 366-xxxx or _____ on (202) 366-xxxx if you have any questions concerning your rights or procedures with respect to this matter.
_____ can also provide you copies of the MSPB regulations and appeal form if you are unable to access the MSPB website.

ACKNOWLEDGEMENT OF RECEIPT:

(If you are not present at an issuance location to sign _____ Date
this document, please acknowledge receipt of this notice
in writing via electronic mail or facsimile)

Office of Management and Budget Issuance

Retyped (without change) by OPM

August 22, 1995

M-95-18

MEMORANDUM FOR HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

FROM: Alice M. Rivlin

Director

SUBJECT: Agency Plans for Operations During Funding Hiatus

OMB Bulletin 80-14, dated August 28, 1980 (and amended by the OMB Director's memorandum of November 17, 1981) requires all agencies to maintain contingency plans to deal with a possible appropriations hiatus. The bulletin requires agency plans to be consistent with the January 16, 1981 opinion of the Attorney General on this subject.

The Office of Legal Counsel of the Department of Justice has issued an opinion dated August 16, 1995 that updates the 1981 opinion. A copy of the August 16th opinion is attached. You should review your plans in light of this opinion, make any changes necessary to conform to the opinion, and otherwise ensure your plan is up to date.

Please send a copy of your updated plan to your OMB program examiner no later than September 5, 1995. Any questions should be directed to your program examiner.

Attachment

Appendix A-1- Attachment

GOVERNMENT OPERATIONS IN THE EVENT

OF A LAPSE IN APPROPRIATIONS

Section 1341 of the Antideficiency Act permits officers and employees of the federal government and of the District of Columbia to incur obligations in advance of appropriations where such obligations are authorized by law, whether expressly or by necessary implication.

Section 1342 of the Antideficiency Act, as amended, permits officers and employees of the federal government and of the District of Columbia to accept voluntary services or employ personal services in excess of those authorized by law only in cases of emergencies where there is (1) a reasonable and articulable connection between the function to be performed and the safety of human life or the protection of property, and (2) some reasonable likelihood that the safety of human life or the protection

of property would be compromised in some significant degree by delay in the performance of the function in question.

August 16, 1995

MEMORANDUM FOR ALICE RIVLIN

DIRECTOR, OFFICE OF MANAGEMENT AND BUDGET

This memorandum responds to your request to the Attorney General for advice regarding the permissible scope of government operations during a lapse in appropriations.⁽¹⁾

The Constitution provides that "no money shall be drawn from the treasury, but in consequence of appropriations made by law." U.S. Const. art. I, 9, cl. 7. The treasury is further protected through the Antideficiency Act, which among other things prohibits all officers and employees of the federal government from entering into obligations in advance of appropriations and prohibits employing federal personnel except in emergencies, unless otherwise authorized by law. See 31 U.S.C. 1341 *et seq.*⁽²⁾

In the early 1980s, Attorney General Civiletti issued two opinions with respect to the implications of the Antideficiency Act. See "Applicability of the Antideficiency Act Upon A Lapse in an Agency's Appropriations," 4A Op. O.L.C. 16 (1980); "Authority for the Continuance of Government Functions During a Temporary Lapse in Appropriations," 5 Op. O.L.C. 1 (1981) (1981 Opinion). The 1981 Opinion has frequently been cited in the ensuing years. Since that opinion was written, the Antideficiency Act has been amended in one respect, and we analyze the effect of that amendment below. The amendment amplified on the emergencies exception for employing federal personnel by providing that "[a]s used in this section, the term 'emergencies involving the safety of human life or the protection of property' does not include ongoing, regular functions of government the suspension of which would not imminently threaten the safety of human life or the protection of property." 31 U.S.C. 1342.

With respect to the effects of this amendment, we continue to adhere to the view expressed to General Counsel Robert Damus of the Office of Management and Budget that "the 1990 amendment to 31 U.S.C. 1342 does not detract from the Attorney General's earlier analyses; if anything, the amendment clarified that the Antideficiency Act's exception for emergencies is narrow and must be applied only when a threat to life or property is imminent." Letter from Walter Dellinger to Robert G. Damus, October 19, 1993. In order to ensure that the clarification of the 1990 amendment is not overlooked, we believe that one aspect of the 1981 Opinion's description of emergency governmental functions should be modified. Otherwise, the 1981 Opinion continues to be a sound analysis of the legal authorities respecting government operations when Congress has failed to enact regular appropriations bills or a continuing resolution to cover a hiatus between regular appropriations.

I.

Since the issuance of the extensive 1981 Opinion, the prospect of a general appropriations lapse has arisen frequently. In 1981, 1982, 1983, 1984, 1986, 1987 and 1990, lapses of funding ranging from several hours to three days actually did occur. While several of these occurred entirely over weekends, others required the implementation of plans to bring government operations into compliance with the requirements of the Antideficiency Act. These prior responses to the threat of or actual lapsed appropriations have been so commonly referred to as cases of "shutting down the government" that

this has become a nearly universal shorthand to describe the effect of a lapse in appropriations. It will assist in understanding the true extent of the Act's requirements to realize that this is an entirely inaccurate description. Were the federal government actually to shut down, air traffic controllers would not staff FAA air control facilities, with the consequence that the nation's airports would be closed and commercial air travel and transport would be brought to a standstill. Were the federal government to shut down, the FBI, DEA, ATF and Customs Service would stop interdicting and investigating criminal activities of great varieties, including drug smuggling, fraud, machine gun and explosives sales, and kidnapping. The country's borders would not be patrolled by the border patrol, with an extraordinary increase in illegal immigration as a predictable result. In the absence of government supervision, the stock markets, commodities and futures exchanges would be unable to operate. Meat and poultry would go uninspected by federal meat inspectors, and therefore could not be marketed. Were the federal government to shut down, medicare payments for vital operations and medical services would cease. VA hospitals would abandon patients and close their doors. These are simply a few of the significant impacts of a federal government shut down. Cumulatively, these actions and the others required as part of a true shut down of the federal government would impose significant health and safety risks on millions of Americans, some of which would undoubtedly result in the loss of human life, and they would immediately result in massive dislocations of and losses to the private economy, as well as disruptions of many aspects of society in advance of appropriations or beyond appropriated levels, restrictions that will cause significant hardship should any lapse in appropriations extend much beyond those we have historically experienced. To be sure, even the short lapses that have occurred have caused serious dislocations in the provision of services, generated wasteful expenditures as agencies have closed down certain operations and then restarted them, and disrupted federal activities. Nevertheless, for any short-term lapse in appropriations, at least, the federal government will not be truly "shut down" to the degree just described, simply because Congress has itself provided that some activities of government should continue even when annual appropriations have not yet been enacted to fund current activities.

The most significant provisions of the Antideficiency Act codify three basic restrictions on the operation of government activities. First, the Act implements the constitutional requirement that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const. art. I, 9, cl. 7. Second, when no current appropriations measure has been passed to fund contracts or obligations, it restricts entering into contracts or incurring obligations (except as to situations authorized by other law). Third, it restricts employing the services of employees to perform government functions beyond authorized levels to emergency situations, where the failure to perform those functions would result in an imminent threat to the safety of human life or the protection of property.⁽³⁾ The 1981 Opinion elaborated on the various exceptions in the Antideficiency Act that permit some continuing government functions, and we will only summarize the major categories here:

- *Multi-year appropriations and indefinite appropriations.*

Not all government functions are funded with annual appropriations. Some operate under multi-year appropriations and others operate under indefinite appropriations provisions that do not require passage of annual appropriations legislation. Social security is a prominent example of a program that operates under an indefinite appropriation. In such cases, benefit checks continue to be honored by the treasury, because there is no lapse in the relevant appropriation.

- *Express authorizations: contracting authority and borrowing authority.*

Congress provides express authority for agencies to enter into contracts or to borrow funds to

accomplish some of their functions. An example is the "food and forage" authority given to the Department of Defense, which authorizes contracting for necessary clothing, subsistence, forage, supplies, etc. without an appropriation. In such cases, obligating funds or contracting can continue, because the Antideficiency Act does not bar such activities when they are authorized by law. As the 1981 Opinion emphasized, the simple authorization or even direction to perform a certain action that standardly can be found in agencies' enabling or organic legislation sufficient to support a finding of express authorization or necessary implication (the exception addressed next in the text), standing alone. There must be some additional indication of an evident intention to have the activity continue despite an appropriations lapse.

- *Necessary implications: authority to obligate that is necessarily implied by statute.*

The 1981 Opinion concluded that the Antideficiency Act contemplates that a limited number of government functions funded through annual appropriations must otherwise continue despite a lapse in their appropriations because the lawful continuation of other activities necessarily implies that these functions will continue as well. Examples include the check writing and distributing functions necessary to disburse the social security benefits that operate under indefinite appropriations. Further examples include contracting for the materials essential to the performance of the emergency services that continue under that separate exception. In addition, in a 1980 opinion, Attorney General Civiletti opined that agencies are by necessary implication authorized "to incur those minimal obligations necessary to closing [the] agency." The 1981 opinion reiterated this conclusion and consistent practice since that time has provided for the orderly termination of those functions that may not continue during a period of lapsed appropriations.

- *Obligations necessary to the discharge of the President's constitutional duties and powers.*

Efforts should be made to interpret a general statute such as the Antideficiency Act to avoid the significant constitutional questions that would arise were the Act read to critically impair the exercise of constitutional functions assigned to the executive. In this regard, the 1981 Opinion noted that when dealing with functions instrumental in the discharge of the President's constitutional powers, the "President's obligational authority . . . will be further buttressed in connection with any initiative that is consistent with statutes -- and thus with the exercise of legislative power in an area of concurrent authority -- that are more narrowly drawn than the Antideficiency Act and that would otherwise authorize the President to carry out his constitutionally assigned tasks in the manner he contemplates." 1981 Opinion, at 6-7.⁽⁴⁾

- *Personal or voluntary services "for emergencies involving the safety of human life or the protection of property."*

The Antideficiency Act prohibits contracting or obligating in advance of appropriations generally, except for circumstances just summarized above. The Act also contains a separate exception applicable to personal or voluntary services that deal with emergencies. 31 U.S.C. 1342. This section was amended in 1990. We will analyze the effects of that amendment in Part II of this memorandum.

Finally, one issue not explicitly addressed by the 1981 Opinion seems to us to have been settled by consistent administrative practice. That issue concerns whether the emergency status of government functions should be determined on the assumption that the private economy will continue operating during a lapse in appropriations, or whether the proper assumption is that the private economy will be interrupted. As an example of the difference this might make,

consider that air traffic controllers perform emergency functions if aircraft continue to take off and land, but would not do so if aircraft were grounded. The correct assumption in the context of an anticipated long period of lapsed appropriations, where it might be possible to phase in some alternatives to the government activity in question, and thus over time to suspend the government function without thereby imminently threatening human life or property, is not entirely clear. However, with respect to any short lapse in appropriations, the practice of past administrations has been to assume the continued operation of the private economy, and so air traffic controllers, meat inspectors, and other similarly situated personnel have been considered to be within the emergency exception of 1342.

II.

The text of 31 U.S.C. 1342, as amended in 1990, now reads:

An officer or employee of the United States Government or of the District of Columbia government may not accept voluntary services for either government or employ personal services exceeding that authorized by law except for emergencies involving the safety of human life or the protection of property. This section does not apply to a corporation getting amounts to make loans (except paid in capital amounts) without legal liability of the United States Government. As used in this section, the term "emergencies involving the safety of human life or the protection of property" does not include ongoing, regular functions of government the suspension of which would not imminently threaten the safety of human life or the protection of property.

31 U.S.C. 1342. Because of the 1342 bar on employing personal services, officers and employees may employ personal services in excess of other authorizations by law only in emergency situations.⁵ This section does not by itself authorize paying employees in emergency situations, but it does authorize entering into obligations to pay for such labor.

The central interpretive task under 1342 is and has always been to construe the scope of the emergencies exception of that section. When the 1981 Opinion undertook this task, the predecessor to 1342 did not contain the final sentence of the current statute, which was added in 1990. Examining that earlier version, the Attorney General concluded that the general language of the provision and the sparse legislative history of it did not reveal its precise meaning. However, the opinion was able to glean some additional understanding of the statute from that legislative history.

The Attorney General noted that as originally enacted in 1884, the provision forbade unauthorized employment "except in cases of sudden emergency involving the loss of human life or the destruction of property." 23 Stat. 17. He then observed that in 1950, Congress enacted the modern version of the Antideficiency Act and accepted revised language for 1342 that originally had been suggested by the Director of the Bureau of the Budget and the Comptroller General in 1947. In analyzing these different formulations, the Attorney General stated that

[w]ithout elaboration, these officials proposed that 'cases of sudden emergency' be amended to 'cases of emergency,' 'loss of human life' to 'safety of human life,' and 'destruction of property' to 'protection of property. These changes were not qualified or explained by the report accompanying the 1947 recommendation or by any aspect of the legislative history of the general appropriations act for fiscal year 1951, which included the modern [1341]. Act of September 6, 1950, Pub. L. No. 81-759, 1211, 64

Stat. 765. Consequently, we infer from the plain import of the language of their amendments that the drafters intended to broaden the authority for emergency employment.

5 Op. O.L.C. at 9.

The 1981 Opinion also sought guidance from the consistent administrative practice of the Office of Management and Budget in applying identical "emergencies" language found in another provision. That other provision prohibits OMB from apportioning appropriated funds in a manner that would indicate the need for a deficiency or supplemental appropriation, except in cases of "emergencies involving the safety of human life, [or] the protection of property" -- phraseology identical to the pre-1990 version of 1342.⁽⁶⁾ Combining these two sources with the statutory text, the Attorney General articulated two rules for identifying functions for which government officers may enter into obligations to pay for personal services in excess of legal authority other than 1342 itself:

First, there must be some reasonable and articulable connection between the function to be performed and the safety of human life or the protection of property. Second, there must be some reasonable likelihood that the safety of human life or the protection of property would be compromised, in some degree, by delay in the performance of the function in question.

While we continue to believe that the 1981 articulation is a fair reading of the Antideficiency Act even after the 1990 amendment, *see* Letter from Walter Dellinger to Robert G. Damus, October 19, 1993, we are aware of the possibility the second of these two rules might be read more expansively than was intended, and thus might be applied to functions that are not emergencies within the meaning of the statute. To forestall possible misinterpretations, the second criteria's use of the phrase "in some degree" should be replaced with the phrase, "in some significant degree."

The reasons for this change rest on our understanding of the function of the 1990 amendment, which comes from considering the content of the amendment, its structure and its sparse legislative history. That history consists of a solitary reference in the conference report to the Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, 104 Stat. 1388:

The conference report also makes conforming changes to title 31 of the United States Code to make clear that . . . ongoing, regular operations of the Government cannot be sustained in the absence of appropriations, except in limited circumstances. These changes guard against what the conferees believe might be an overly broad interpretation of an opinion of the Attorney General issued on January 16, 1981, regarding the authority for the continuance of Government functions during the temporary lapse of appropriations, and affirm that the constitutional power of the purse resides with Congress.

H.R. Rep. No. 964, 101st Cong., 2d Sess. 1170 (1990). While hardly articulating the intended scope of the exception, the conference report does tend to support what would otherwise be the most natural reading of the amendment standing alone: because it is phrased as identifying the functions that should be excluded from the scope of the term "emergency," it seems intended to limit the coverage of that term, narrowing the circumstances that might otherwise be taken to constitute an emergency within the meaning of the statute.

Beyond this, however, we do not believe that the amendment adds any significant new substantive meaning to the pre-existing portion of 1342, simply because the most prominent feature of the addition -- its emphasis on there being a threat that is imminent, or "ready to take place, near at hand," *see*

Webster's Third New International Dictionary 1130 (1986) -- is an idea that is already present in the term "emergency" itself, which means "an unforeseen combination of circumstances or the resulting state that calls for immediate action" to respond to the occurrence or situation. *Id.* at 741.⁽⁷⁾ The addition of the concept of "imminent" to the pre-existing concept of "emergency" is thus largely redundant. This redundancy does, however, serve to emphasize and reinforce the requirement that there be a threat to human life or property of such a nature that immediate action is a necessary response to the situation. The structure of the amendment offers further support for this approach. Congress did not alter the operative language of the statute; instead, Congress chose to enact an interpretive provision that simply prohibits overly expansive interpretations of the "emergency" exception.

Under the formulation of the 1981 Opinion, government functions satisfy 1342 if, inter alia, the safety of human life or the protection of property would be "compromised, in some degree." It is conceivable that some would interpret this phrase to be satisfied even if the threat were de minimis, in the sense that the increased risk to life or property were insignificant, so long as it were possible to say that safety of life or protection of property bore a reasonable likelihood of being compromised at all. This would be too expansive an application of the emergency provision. The brief delay of routine maintenance on government vehicles ought not to constitute an "emergency," for example, and yet it is quite possible to conclude that the failure to maintain vehicles properly may "compromise, to some degree" the safety of the human life of the occupants or the protection of the vehicles, which are government property. We believe that the revised articulation clarifies that the emergencies exception applies only to cases of threat to human life or property where the threat can be reasonably said to be near at hand and demanding of immediate response.

Appendix A-1 Footnotes

1. We do not in this memorandum address the different set of issues that arise when the limit on the public debt has been reached and Congress has failed to raise the debt ceiling.
2. For the purposes of this inquiry, there are two relevant provisions of the Antideficiency Act. The first provides that "[a]n officer or employee of the United States Government or the District of Columbia government may not . . . involve either government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law." 31 U.S.C. 1341(a)(1)(B). The second provides that "[a]n officer or employee of the United States Government . . . may not accept voluntary services . . . or employ personal services exceeding that authorized by law except for emergencies involving the safety of human life or the protection of property." 31 U.S.C. 1342.
3. These restrictions are enforced by criminal penalties. An officer or employee of the United States who knowingly and willfully violates the restrictions shall be fined not more than \$5,000, imprisoned for not more than 2 years, or both. 31 U.S.C. 1350.
4. The Attorneys General and this office have declined to catalog what actions might be undertaken this heading. In 1981, for example, Attorney General Civiletti quoted Attorney General (later Justice) Frank Murphy. "These constitutional powers have never been specifically defined, and in fact cannot be, since their extent and limitations are largely dependent upon conditions and circumstances. . . . The right to take specific action might not exist under one state of facts, while under another it might be the absolute duty of the Executive to take such action." 5 Op. O.L.C. at 7 n.9 (quoting 39 Op. Att'y Gen. 343, 347-48 (1939)). This power should be called upon cautiously, as the courts have received such executive branch assertions skeptically. See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952);

George v. Ishimaru, 849 F. Supp. 68 (D.D.C.), *vacated as moot*, No. 94-5111, 1994 WL 517746 (D.C. Cir., Aug. 25, 1994). But see *Haig v. Agee*, 453 U.S. 280 (1981); *In re Neagle*, 135 U.S. 1 (1890).

5. The 1981 Opinion concluded that: [d]espite the use of the term 'voluntary service,' the evident concern underlying this provision is not government agencies' acceptance of the benefit of services rendered without compensation. Rather, the original version of [1342] was enacted as part of an urgent deficiency appropriation act in 1884, Act of May 1, 1994, ch. 37, 23 Stat. 15, 17, in order to avoid claims for compensation arising from the unauthorized provision of services to the government by non-employees, and claims for additional compensation asserted by government employees performing extra services after hours. This is, under [1342], government officers and employees may not involve government in contract for employment, i.e., for compensated labor, except in emergency situations. 30 Op. Att'y Gen. 129, 131 (1913).

6. 31 U.S.C. 1515 (recodified from 665(e) at the time of the Civiletti opinion). Analyzing past administrative practice under this statute, Attorney General Civiletti found that: Directors of the Bureau of the Budget and of the Office of Management and Budget have granted dozens of deficiency reapportionments under this subsection in the last 30 years, and have apparently imposed no test more stringent than the articulation of a reasonable relationship between the funded activity and the safety of human life or the protection of property. Activities for which deficiency apportionments have been granted on this basis include [FBI] criminal investigations, legal services rendered by the Department of Agriculture in connection with state meat inspection programs and enforcement of the Wholesome Meat Act of 1967, 21 U.S.C. 601-695, the protection and management of commodity inventories by the Commodity Credit Corporation, and the investigation of aircraft accidents by the National Transportation Safety Board. These few illustrations demonstrate the common sense approach that has guided the interpretation of 665(e). Most important, under 665(e)(2), each apportionment or reapportionment indicating the need for a deficiency or supplemental appropriation has been reported contemporaneously to both Houses of Congress, and, in the face of these reports, Congress has not acted in any way to alter the relevant 1950 wording of 665(e)(1)(B), which is, in this respect, identical to 665(b).

7. See also Random House Dictionary of the English Language Unabridged 636 (2d ed. 1987) ("emergency" means "a sudden, urgent, usually unexpected occurrence or occasion requiring immediate action"); Webster's II New Riverside University Dictionary 427 (1988) ("an unexpected, serious occurrence or situation urgently requiring prompt action").



Office of Management and Budget Issuance

Retyped (without change) by OPM

Walter Dellinger

Assistant Attorney General October 5, 1990

M-91-02

MEMORANDUM FOR HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

FROM: Richard G. Darman

SUBJECT: Agency Operations in the Absence of Appropriations

The Continuing Resolution (CR) expires at midnight tonight, October 5, 1990. We have no indication yet whether Congress will act today and pass a CR. The President has stated that it is his intention not to sign a CR until there has been satisfactory Congressional progress on the budget. At this point, there has clearly not been satisfactory Congressional action. Therefore, beginning tomorrow morning (Saturday), October 6th, the head of each agency *must* be prepared to implement his or her existing plan for closing down operations funded by accounts that have not received appropriations.

OMB Bulletin 80-14, dated August 28, 1980 (and amended by the OMB Director's memorandum of November 17, 1981), requires all agencies to maintain plans to deal with such an appropriations hiatus. Furthermore, the Attorney General's opinion dated January 16, 1981, supporting this bulletin, remains in effect. In general:

- Employees of affected agencies performing non-excepted activities (as discussed in the Attorney General's opinion) may not perform any services other than those involved in the orderly suspension of non-excepted activities; excepted activities that may be continued are generally those that are authorized by law or that protect life and property.
- Agencies may not permit voluntary performance of non-excepted services.

Implementation of this shutdown process will be particularly difficult because any lapse of appropriations will occur over a weekend (with a Monday holiday).

- *Weekend Employees* -- Agency shutdown plans should be implemented for non-excepted weekend employees, who should be instructed to report for their first scheduled work turn for the sole purpose of engaging in orderly shutdown activities. Excepted weekend employees should be instructed to report for work and to perform their excepted activities.

- *All Other Employees* -- All regular employees performing non-excepted activities, as well as excepted employees, should be instructed to report for work on Tuesday, October 9th, as scheduled.

Over the weekend and during the day on Tuesday, we will provide further instructions, depending on the status of appropriations action, as follows:

- *Normal operations*: If a CR that suspends sequester is clearly likely to be enacted on Tuesday (or has been enacted over the weekend), agencies will be instructed to operate in a normal manner.
- *Shutdown*: If no CR is likely to be enacted on Tuesday, we will issue instructions initiating a phase-down of activities for non-excepted employees. Such phase-down activities for non-excepted personnel, if called for, should be completed during the first *three hours* of the workday.
- *Sequester*: If (on or before Tuesday) a CR is enacted that does not suspend sequester, you should begin implementing your sequester plan.

Please address any question to your OMB budget examiner(s), or to OMB Acting General Counsel Robert Damus (395-5044), or Associate General Counsel for Budget Rosalyn Rettman (395-5600).



Office of Management and Budget Issuance

Retyped (without change) by OPM

Bulletin No. 80-14, Supplement No. 1 August 20, 1982

TO THE HEADS OF EXECUTIVE DEPARTMENTS AND ESTABLISHMENTS

SUBJECT: Agency Operations in the Absence of Appropriations

1. *Purpose.* This supplement updates OMB Bulletin No. 80-14, dated August 28, 1980, and requires the submission of contingency plans for review by OMB. The purpose of the review is to assure adequate contingency planning and Government-wide compliance with the provisions of the Antideficiency Act.

2. *Background.* OMB Bulletin No. 80-14 instructed agencies to develop plans for an orderly shutdown in the event of a funding hiatus. It became necessary to carry out these plans during the November 1981 hiatus. In reviewing that experience and the operational plans in effect during the period immediately preceding enactment of the March 31, 1982 Continuing Resolution, certain difficulties were observed:

- some agencies have not fully complied with the requirements of OMB Bulletin 80-14, and do not have fully operational contingency plans;
- disparities appear to exist between some agencies as to the definition of activities necessary to protect life and property; and
- disparities appear to exist between some agencies as to the time necessary to complete the orderly shutdown of nonexcepted activities.

3. *Actions required:*

- a. Amend the date that appears in section 2 to January 16, 1981.
- b. Delete the last sentence of subsection 3.c.
- c. Add subsection 3.d. as shown in the attachment.

David A. Stockman

Director

Attachment

Attachment-Appendix A-3

Material to be added to

OMB Bulletin No. 80-14,

Section 3

d. *Reporting.* The plans required in subsection c will be submitted to OMB by September 15, 1982.

The following information will be provided with the plans:

- (1) Estimated time to the nearest one-half day to complete the shutdown in accordance with the plan.
- (2) Number of employees expected to be on-board before implementation of the plan.
- (3) Total number of employees to be retained under the plan because (a) they are engaged in military, law enforcement, or direct health care activities, or (b) their compensation is financed by other than annual appropriations.
- (4) Number of employees, not otherwise exempt, to be retained to protect life and property.

Within the guidance established by the Attorney General's opinion of January 16, 1981, and this bulletin, agency heads are to make such determinations as are necessary to operate their agencies during an appropriations hiatus, and to do so pursuant to normal agency processes for the resolution of issues of law and policy. Questions that cannot be determined by an agency should be addressed to OMB. All unresolved questions relative to the construction of the Antideficiency Act will be jointly referred to the Office of Legal Counsel of the Department of Justice.

If it is estimated that more than one-half day will be needed to complete the shutdown or that the number of employees to be retained to protect life and property will exceed five percent of the number of employees on board at the beginning of the hiatus less those exempt for reasons specified in item (3) above, agencies will submit policy statements and legal opinions supporting those estimates.



Office of Management and Budget Issuance

Retyped (without change) by OPM

November 17, 1981

MEMORANDUM FOR HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

FROM: David A. Stockman

SUBJECT: Agency Operations in the Absence of Appropriations

Public Law 97-51, the Continuing Resolution enacted by the Congress on September 30, 1981 to provide for appropriations for all Executive and Judicial branch accounts, will expire on midnight Friday, November 20. No regular appropriations bills for Fiscal Year 1982 have been submitted to the President during the period of the Continuing Resolution, and the House of Representatives and Senate are presently considering widely divergent Second Continuing Resolutions. There is, therefore, a possibility that no appropriations will be enacted as of November 21.

Under the circumstances, you should begin orderly planning to deal with this possibility.

OMB Bulletin 80-14, dated August 28, 1980, requires all agencies to maintain contingency plans to deal with the eventuality of an appropriations hiatus. Additionally, the opinion of the Attorney General dated January 16, 1981, attached, remains in effect.

Examples of excepted activities were developed when the Executive Branch last faced the possibility of an appropriations hiatus, and were sent to agencies by former OMB Director James McIntyre on September 30, 1980. They are:

Beginning [November 21, 1981], agencies may continue activities otherwise authorized by law, those that protect life and property and those necessary to begin phasedown of other activities.

Primary examples of activities agencies may continue are those which may be found under applicable statutes to:

1. Provide for the national security, including the conduct of foreign relations essential to the national security or the safety of life and property.
2. Provide for benefit payments and the performance of contract obligations under no-year or multi-year or other funds remaining available for those purposes.
3. Conduct essential activities to the extent that they protect life and property, including:
 - a. Medical care of inpatients and emergency outpatient care;
 - b. Activities essential to ensure continued public health and safety, including safe use of food and drugs and safe use of hazardous material;

c. The continuance of air traffic control and other transportation safety functions and the protection of transport property;

d. Border and coastal protection and surveillance;

e. Protection of Federal lands, buildings, waterways, equipment and other property owned by the United States;

f. Care of prisoners and other persons in the custody of the United States;

g. Law enforcement and criminal investigations;

h. Emergency and disaster assistance;

i. Activities essential to the preservation of the essential elements of the money and banking system of the United States, including borrowing and tax collection activities of the Treasury;

j. Activities that ensure production of power and maintenance of the power distribution system; and

k. Activities necessary to maintain protection of research property.

You should maintain the staff and support services necessary to continue these essential functions.

In addition, the following policies will be in effect in the event of a November 21 appropriations hiatus:

1. All employees performing non-excepted activities defined by this memorandum and by the Attorney General's opinion of January 16, 1981, are permitted to perform no services other than those involved in the orderly suspension of agency operations.

2. With regard to non-excepted agency activities and agency personnel performing them, particular attention should be paid to those provisions of the Antideficiency Act that do not permit agency acceptance of voluntary, i.e. non-excepted services. Accordingly, in the event that the appropriations hiatus continues measurably beyond Monday, November 23, 1981, agency heads will be required to make determinations as to whether non-excepted personnel have completed all phasedown tasks incident to the orderly suspension of agency operations. At such time, the services of those employees can no longer be accepted in the absence of appropriations.

3. This memorandum is principally directed towards the ability of agencies to *obligate* funds in the absence of appropriations. It should be made clear that, during a appropriations hiatus, funds may not be available to permit agency *payment* of obligations. All personnel performing excepted services, including activities incident to the orderly suspension of agency operations, should be assured that the United States will not contest its legal obligation to make payment for such services, even in the absence of appropriations.

4. Agencies are requested to report promptly to OMB staff who normally handle their budgets any major disruptions of activities or services that may or will imminently result from the absence of appropriations.

5. Within the guidance established by the Attorney General's opinion of January 16, 1981, and this memorandum, agency heads are to make such determinations as are necessary to operate their agencies during an appropriations hiatus, and to do so pursuant to normal agency processes for the resolution of issues of law and policy. Questions that cannot be determined by an agency should be addressed to OMB. All unresolved questions relative to the construction of the Antideficiency Act will be jointly referred to the Office of Legal Counsel of the Department of Justice.



Office of Management and Budget Issuance

Retyped (without change) by OPM

Bulletin No. 80-14

August 28, 1980

TO THE HEADS OF EXECUTIVE DEPARTMENTS AND ESTABLISHMENTS

SUBJECT: Shutdown of Agency Operations Upon Failure by the
Congress to Enact Appropriations

1. *Purpose and Coverage.* This Bulletin provides policy guidance and instructions for actions to be taken by Executive Branch agencies when failure by the Congress to enact either regular appropriations, a continuing resolution, or needed supplementals results in interruption of fund availability. This Bulletin does not apply to specific appropriations action by the Congress to deny program funding. In the instance of partial funding interruptions, e.g., failure of the Congress to act on program supplementals, special procedures beyond those outlined in this Bulletin may be warranted. In such cases, OMB representatives responsible for the affected agency's budget estimates should be consulted.

2. *Background.* The Attorney General issued an opinion on April 25, 1980 that the language and legislative history of the Antideficiency Act (31 USC 665) unambiguously prohibits agency officials from incurring obligations in the absence of appropriations. The essential elements of the Attorney General's advice are that:

a. In the absence of new appropriations, Federal officers may incur no obligations that cannot lawfully be funded from prior appropriations unless such obligations are otherwise authorized by law.

b. Under authority of the Antideficiency Act, Federal officers may incur obligations as necessary for orderly termination of an agency's functions, but no funds may be disbursed.

c. Under its enforcement responsibilities, the Department of Justice will take actions to apply the criminal provisions of the Antideficiency Act in the future when violations of the Act are alleged under such circumstances.

3. *Actions required.* Agencies faced with funding interruptions must take steps to forestall interruptions in operations and assure that they are in a position to limit their activities to those directly related to orderly shutdown of the agency.

a. *Reallocation of funds prior to shutdown.* Prior to initiation of orderly shutdown activities, agency heads will limit their operations to minimum essential activities and will reallocate to the extent

permitted by law all available funds in order to forestall the fund interruption date as long as possible. Reallocation of funds will be made subject to the following requirements:

(1) Reallocation below the appropriation and fund account level will be accomplished by telephonic revision to allotments and suballotments (such revisions will be documented and immediately reflected in formal written changes to the regular allotment/suballotment documents).

(2) Agencies that have specific statutory authority to reallocate and transfer funds between appropriation and/or fund accounts will effect the transfers in accordance with current standard fiscal procedures. Such transfers generally will be effected on Standard Form (SF) 1151, "Nonexpenditure Transfer of Funds" (see OMB Circular No. A-11, section 21.2, for a description of when expenditure transfers might be required). This Bulletin does not convey new authority to transfer funds.

(3) For this purpose adjustment to amounts contained in OMB apportionments may be made without submission of a reapportionment request.

b. Orderly shutdown activities. When all available funds, including reallocated/ reallocated funds, are exhausted, orderly shutdown activities must begin. Each agency head must determine the specific actions that will be taken; however, all actions must contribute to orderly shutdown of the agency and give primary consideration to protecting life and safeguarding Government property and records. Such actions should be accomplished in a way that will facilitate reactivation when funds are made available. Agency heads will notify OMB, OPM, Treasury, and GSA immediately when shutdown activities are being initiated. These central agencies will be responsible for notifying their own regional offices, except as noted in paragraph (3).

(1) *Appropriations and funds.* Agency heads will limit obligations incurred to those needed to maintain the minimum level of essential activities necessary to protect life and property; to process the necessary personnel actions; to process the personnel payroll for the periods prior to fund interruption; and to provide for orderly transfer of custody of property and records to the General Services Administration (GSA) and the Office of Personnel Management (OPM) for disposition.

(2) *Personnel and personnel records.* Necessary personnel actions will be taken to release employees in accordance with applicable law and Office of Personnel Management's regulations. Preparation of employee notices of furlough and processing of personnel and pay records in connection with furlough actions are essential shutdown activities. Agencies should plan for these functions to be performed by employees who are retained for orderly termination of agency activities, as long as those employees are available. As soon as agencies determine the date after which they will no longer be able to maintain custody of personnel records, they should notify the Office of Personnel Management to arrange for orderly transfer of custody of the personnel records to OPM and GSA, jointly, for caretaking and protection of the records. If necessary to protect the interests of individual employees during the period when all employees of the agencies are on furlough, OPM will provide access to the appropriate personnel records to retrieve information and/or process personnel actions, e.g., separation-transfer of an employee who secures employment in another agency. Guidance for planning such actions and relevant questions and answers as to employees' benefits will be provided separately by OPM.

(3) *Property and nonpersonnel records.* Inventories of property and records will be made to assure protection of the Government's interests and the claims of affected private entities and individuals (including vendors and beneficiaries of Federal programs). Upon determination that agency funds are no

longer available, agency officials should contact the appropriate Regional Administrators, General Services Administration, for assistance in determining the disposition of agency records, real and personal property, and outstanding requisitions, contracts, grants and related items. Detailed guidance on such matters are contained in:

- 41 CFR 101-11.4; Dispositions of records.
- 41 CFR 101-43 and 101-47; Disposition of personal property and real property.
- FPMR 101-36.5, 101-37.203(c), and 101-37.307-1, Dispositions of automatic data processing, communications, and telephone equipment.
- GSA motor pool accounting and record system operations guide; Disposition of motor vehicles.

The transfer to the General Services Administration of property and records shall not be made until 30 days have elapsed from the start of shutdown activities and then only after a determination is made that the funding hiatus will continue indefinitely.

c. *Planning.* Agency heads should develop plans for an orderly shutdown that reflect the policy and guidance provided in this Bulletin. Such plans necessarily will be tailored to each agency's needs in recognition of the unique nature of its funding sources, missions, and authorities. While every agency should have a plan, the scope and detail of the plan should be commensurate with the likelihood that shutdown will be necessary and with the complexity of shutting down the agency.

4. *Effective dates.* The instructions in this Bulletin are effective immediately and remain in effect until rescinded.

5. *Inquiries.* Budgetary questions should be directed to the OMB representatives responsible for review of each agency's budget estimates. Fiscal procedures questions should be directed to the Division of Government Accounts and Reports, Bureau of Government Financial Operations, Department of the Treasury, Treasury Annex #1, Washington, D.C. 20226 (Telephone: (202) 566-5844).

Agency officials may obtain additional information and technical assistance on personnel matters by contacting their agency officer at the Office of Personnel Management.

Property and nonpersonnel records disposition questions should be directed to Office of Plans, Programs, and Financial Management, General Services Administration, Washington, D.C. (Telephone: (202) 566-1807).

James T. McIntyre, Jr.

Director